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Supreme Court of the United States

October Term, 1957

No. 69

SAFEWAY STORES, INCORPORATED,
a corporation,
Petitioner,
vs.
HARRY V. VANCE, Trustee in
Bankruptcy for
FRANK MELVIN THOMPSON, BANKRUPT,
Respondent.

PETITION OF HARRY V. VANCE, TRUSTEE IN BANKRUPTCY FOR FRANK MELVIN THOMPSON, BANKRUPT, FOR REHEARING

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Comes now the above-named Harry V. Vance, Trustee in Bankruptcy for Frank Melvin Thompson, Bankrupt, and presents this, his Petition for Rehearing in the above entitled cause, and in support thereof, adopts the Petition of Nashville Milk Company for Rehearing in Cause Number 67, October Term, 1957, in this Court.

Petitioner further respectfully submits that the remarks of Representative Celler during the debate on the conference report in the House, as well as the debate in the Senate, indicate that the House conferees and the authors of the Act in the Senate considered that the entire Robinson-Patman Act was intended to amend the Clayton Act.

I.

THE ENTIRE ROBINSON-PATMAN ACT WAS INTENDED TO AMEND THE CLAYTON ACT

The statements of Representative Celler in the House of Representatives and the statement of Senator Van Nuys in the Senate fairly indicate that the Robinson-Patman Act in its entirety was accepted as an amendment to the Clayton Act, and that the treble damage remedy was considered applicable to Section 3 of that Act. The following remarks of Representative Celler, ranking member of the House Conference Committee cannot, it is submitted, be logically interpreted except in the light that Section 3 of the Robinson-Patman Act carried the treble damage penalty (80 Congressional Record 9420):

> "MR. CELLER: I ask the gentleman to read Section 3, the Borah-Van Nuys provision, and then read section 2 and section 1 and see whether that is so.
>
> Also, let me point out, *this bill is an amendment to the Clayton Act, which provides that anyone aggrieved by any discrimination in price or discount or allowance can sue and recover triple damages from the person guilty of the discrimination. In addition, for the same act of discrimination, to the triple damages the businessman accused can, by section 3 of this bill, be hailed to court and fined $5,000 or imprisoned for 1 year.* I ask you to think carefully before you accept such a bill with such penalties." (Emphasis supplied)

> "MR HEALEY: One further question, if the gentleman will permit. In the gentleman's judgment, the Borah-Van Nuys amendment in and of itself would amply take care of the situation?
>
> MR. CELLER: There is no question but what the Borah-Van Nuys provision in and of itself would be

sufficient. I would have gladly supported this bill in its entirety if this provision had been controlling.

MR HANCOCK of New York: Mr. Speaker, will the gentleman yield?

MR. CELLER: I yield.

MR HANCOCK of New York: If a vendor is found guilty of discrimination as provided in this bill, is he subject to the aggrieved party for damages or has he committed a crime and subjected himself to penalty?

MR. CELLER: If he violates the Borah-Van Nuys provision or the other provision of the bill he is subject to penalties of a criminal nature and has committed an offense.

MR. HANCOCK of New York: Would he also be liable for triple damages?

MR CELLER: *And he would also have to respond in triple damages under the provisions of the Clayton Act.* Anyone aggrieved can sue." (Emphasis supplied)

It should be noted that Senator Robinson had said (80 Congressional Record 6277) that the purpose of all this legislation was to correct defects in the Clayton Anti-trust Act. Senator Logan and Senator Borah had agreed that the objectives of the Borah-Van Nuys Amendment were the same as the objectives of the Robinson Bill (80 Congressional Record 1633).

Representative Healey had stated that the Borah-Van Nuys Bill more nearly conformed to the spirit of the Clayton Act than many of the provisions of the Patman Bill (80 Congressional Record 8227). Mr. Celler's statement in the debate last above quoted that "there is no question but the Borah-Van Nuys provision in and of itself would be sufficient" is therefore particularly significant. The inference seems inescapable that the Borah-Van Nuys provision, as a whole, was considered an act whose purpose was to correct

the defects in the Clayton Antitrust Act, and was in its entirety an amendment to that Act as stated by Representative Celler.

The assertion of Senator Vandenberg at 80 Congressional Record 9903:

> "The fact has been called to my attention that Section 3 of the Bill, as agreed upon in conference, makes certain discriminations punishable by fine and also subject to treble damages, while similar discriminations under Section 2 (b) would be subject to rebuttal by showing, for instance, that a reduced price was made in good faith to meet an equally low price of a competitor . . . ."

uncontroverted by Senator Van Nuys, is equally persuasive proof that Section 3 was considered in the Senate as an amendment of the Clayton Act, and as carrying the treble damage remedy.

For the foregoing reasons, and for the reasons set forth in the Petition of the Nashville Milk Company for rehearing, it is respectfully urged that this Petition for Rehearing be granted, and that the Judgment of the Court of Appeals of the Tenth Circuit, upon further consideration, be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Robert J. Nordhaus, one of counsel for the above named petitioner, Harry V. Vance, Trustee in Bankruptcy for Frank Melvin Thompson, Bankrupt, do hereby certify that the foregoing Petition for rehearing of this cause is presented in good faith and not for delay.

ROBERT J. NORDHAUS,
One of counsel for Harry V. Vance,
Trustee in Bankruptcy for
Frank Melvin Thompson, Bankrupt

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PETITIONER'S MOTION TO MODIFY ORDER OR CLARIFY OPINION

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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Petitioner respectfully moves that the opinion and order in this case be modified in the following respects:

1. That the judgment of the Court of Appeals be reversed without remand to the District Court, or

2. In the alternative, if remanded, that the language in the last paragraph of the opinion, reading: "... and that the respondent *was* entitled to a trial as to the charges of unlawful price discrimination" be amended to read: "... and that the respondent *may be* entitled to a trial as to charges of unlawful price discrimination".

STATEMENT

The only issue presented to the Court for decision was whether a private remedy existed for violation of Section 3 of the Robinson-Patman Act as such. Respondent's first amended complaint (R. 1-5) charged only a violation of that section. The area price discrimination alleged was limited specifically to violations of Section 3 (R. 3). Respondent did not attempt to allege a violation of Section 2 of the Clayton Act, and did not do so.

In the original order dismissing the complaint, the respondent was given thirty days in which to amend (R. 8). Respondent elected not to amend, but to rest his case solely upon violations of Section 3 of the Robinson-Patman Act. A formal election to this effect was duly filed (R. 27).

The court held in this case, and in Nashville Milk Company vs. the Carnation Company, No. 67, that a private cause of action does not lie for violation of Section 3 of the Robinson-Patman Act as such. Since respondent formally elected to proceed only under said Section, and stood upon said election throughout this litigation, it is respectfully submitted that the more appropriate disposition of this cause is the reversal of the judgment of the Court of Appeals of the Tenth Circuit, without remand.

If the case is to be remanded for further proceedings in the District Court, it is respectfully submitted that the

language of the opinion stating that respondent "... *was* entitled to a trial as to the charges of unlawful price discrimination", should be clarified. That language can be construed as a holding of this Court, that respondent's first amended complaint in its present form is sufficient as a matter of pleading to allege price discriminations which violate Section 2(a) of the Clayton Act. The sufficiency of the first amended complaint to allege a price discrimination which violated Section 2(a) of the Clayton Act was not an issue before this Court. The question was neither presented, briefed, nor argued. It was not passed upon by either of the Courts below. It is a question which in the first instant should be decided by the trial court.

It is respectfully submitted that respondent's first amended complaint in its present form is insufficient to allege a price discrimination which violates Section 2(a) of the Clayton Act, in that it fails to allege that at least one of the purchases involved in such discrimination was in commerce.

The Court's opinion does not refer to the respondent's election to stand upon his first amended complaint (R. 27) and does not purport to decide the effect of such election. No such issue was presented to this Court for decision and was neither briefed nor argued. Whether further amendment of the complaint should be allowed in view of said election is a question resting primarily in the discretion of the District Court.

In view of the above, it is respectfully submitted that the order of this Court should be modified so as merely to reverse the judgment of the Court of Appeals for the Tenth Circuit. If the case is to be remanded, it is further respectfully submitted that the remand should be in such terms as

will permit the District Court to decide all issues presented to it concerning a violation of Section 2(a) of the Clayton Act, particularly those of pleading and procedure indicated above.

Respectfully submitted,

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